

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1168

Cir. Ct. No. 2011FA885

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

NANCY ANN BAXTER,

PETITIONER-APPELLANT,

V.

BRYAN PHILIP BAXTER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
FRANK D. REMINGTON, Judge. *Reversed and cause remanded with directions.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Nancy Baxter appeals the circuit court judgment of divorce from Bryan Baxter.¹ Nancy challenges the divorce judgment in three main respects. First, Nancy argues that the court erred by classifying a rental property that Bryan purchased prior to the marriage as Bryan’s non-divisible asset, and by excluding the property from the divisible assets. Second, Nancy contends that the maintenance awarded to her was inadequate in duration and amount and, specifically, that the court erred by double counting her pension as an asset awarded to her in the property division and also as part of her income stream when awarding maintenance. Third, Nancy asserts that the court failed to correct a “transcription error” in a document that was incorporated into the divorce judgment, which resulted in an incorrect valuation of the debt on the marital home and incorrect equalization payment.

¶2 We conclude: (1) the rental property was a divisible asset that should have been included in the property division; (2) the circuit court improperly double counted Nancy’s pension; and (3) the debt on the marital home was incorrectly valued. We also clarify certain legal and factual errors to be addressed before the circuit court with respect to three additional issues that Nancy raises regarding maintenance. We therefore reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶3 Nancy and Bryan were married on February 19, 1993, and divorced on December 10, 2012.

¹ The parties refer to themselves as “Nancy” and “Bryan.” We will do the same.

¶4 The circuit court held a contested divorce hearing, at which Bryan appeared with counsel and Nancy appeared pro se. Following this hearing, the court issued the divorce judgment that set forth the division of the parties' assets and the maintenance award. The court awarded Nancy assets with a gross value of \$98,761.48 and assigned to her liabilities totaling \$41,890.77. The main asset awarded to Nancy was a pension that she accrued through a former employer, which was valued at \$92,761.48 as of the date of the divorce. The court awarded Bryan assets with a gross value of \$399,978.62 and assigned to him liabilities totaling \$187,827.87. As pertinent to the issues now on appeal, the assets awarded to Bryan included the marital home, which the court determined had a fair market value of \$224,599, with mortgage and lien debts of \$164,400, for a net value of \$60,199. The court ordered Bryan to pay Nancy an equalization payment of \$77,640.02, and, as a result, each party received assets totaling \$134,510.73.

¶5 With regard to maintenance, for the first year following the divorce (December 2012 to December 2013), the court ordered Bryan to pay Nancy maintenance in the amount of \$2,800 per month. For the following three years (December 2013 to December 2016), the court ordered Bryan to pay Nancy maintenance in the amount of \$2,500 per month, with the maintenance payments terminating on December 9, 2016.

DISCUSSION

Standard of Review

¶6 “A circuit court’s decision on how to divide *divisible* property is discretionary.” *Derr v. Derr*, 2005 WI App 63, ¶9, 280 Wis. 2d 681, 696 N.W.2d 170 (alteration in original). However, the determination whether property is

divisible typically involves “non-discretionary property division questions” under WIS. STAT. § 767.61(2)(a) (2011-12).² *Derr*, 280 Wis. 2d 681, ¶9.

¶7 “The amount and duration of maintenance to be awarded is entrusted to the circuit court’s discretion.” *Schmitt v. Schmitt*, 2001 WI App 78, ¶9, 242 Wis. 2d 565, 626 N.W.2d 14. We do not reverse a circuit court’s discretionary determination absent an erroneous exercise of discretion. *Id.* “[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Id.* (quoted source omitted). To determine the amount of maintenance, the circuit court must apply the relevant statutory factors to the facts of the case. *Id.*

¶8 “A circuit court erroneously exercises its discretion if it makes an error of law. The issues presented here concern whether the circuit court applied incorrect legal standards in dividing [assets] and calculating maintenance.” *McReath v. McReath*, 2011 WI 66, ¶21, 335 Wis. 2d 643, 800 N.W.2d 399 (citation omitted). We address each of the issues raised by Nancy as follows.

Exclusion of Property from Divisible Assets

¶9 Nancy first argues that the circuit court erred by classifying a rental property that Bryan purchased before the marriage as Bryan’s non-divisible asset. Nancy contends that the rental property is a divisible asset. We agree.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶10 “The general rule is that assets and debts acquired by either party before or during the marriage are divisible upon divorce.” *Derr*, 280 Wis. 2d 681, ¶10. There is a statutory exception for property acquired before or during the marriage by gift, by reason of the death of another, or with funds from either source. See WIS. STAT. § 767.61(2)(a).³ The application of § 767.61(2)(a) “involves both fact finding and legal questions, but it does not involve the exercise of discretion.” *Derr*, 280 Wis. 2d 681, ¶10.

¶11 The property at issue here is rental property that Bryan brought to the marriage. Bryan testified that he purchased the rental property in December 1987 (approximately six years before the marriage), and that he paid off the mortgage in October 1988. Bryan testified that no marital funds were used to maintain the rental property, and that Nancy did not contribute to the upkeep of the rental property. Bryan testified that the rental property had a fair market value of \$85,200. Nancy objected to the exclusion of the rental property from the divisible assets.

³ WISCONSIN STAT. § 767.61(2)(a) provides:

Except as provided in par. (b), any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:

1. As a gift from a person other than the other party.
2. By reason of the death of another
3. With funds acquired in a manner provided in subd. 1. or 2.

¶12 Regarding the rental property, the circuit court stated:

I do agree that the [rental property] is not a marital asset and can be excluded from the marital estate for the following reasons: The testimony is uncontroverted that it was purchased prior to the marriage, that there is no debt service on the property during the marriage, no marital assets were expended maintaining the property.... Mrs. Baxter didn't work on the property. There's really very little, if not any connection between the marriage, this couple and that property.

Accordingly, the circuit court did not include the rental property in the division of the parties' divisible assets.

¶13 Contrary to the circuit court's reasoning, under WIS. STAT. § 767.61(2)(a), the only property that remains individual property and not subject to division upon divorce is property acquired before or during the marriage by gift or by reason of the death of another, or acquired with funds from either source. Although Bryan brought the rental property to the marriage and no marital funds were spent on the property, nothing in the record suggests that the rental property fits an exception listed in § 767.61(2)(a). Moreover, we observe that the factors the circuit court relied on, including that Nancy did not work on the rental property, do not support the conclusion that the rental property should be excluded from the divisible assets. We conclude that the rental property is a divisible asset, and that the court erred by excluding it from the property division.

¶14 Bryan argues that the circuit court awarded him the rental property as part of an unequal distribution of the divisible assets pursuant to WIS. STAT. § 767.61(3). We reject this argument. Throughout the divorce hearing, the court repeatedly indicated that it intended to divide the divisible assets equally. For example, the court stated that it "was making a list of what's included in the equal distribution," and asked Nancy, "I assume you don't object to getting half of the

assets acquired during the course of the marriage.” Moreover, the court equally divided the assets that it categorized as divisible, and after Bryan’s equalization payment to Nancy, each party received assets totaling \$134,510.73. The record therefore belies Bryan’s contention that the court awarded him the rental property as part of an unequal distribution of the divisible assets pursuant to § 767.61(3).

Maintenance Award

¶15 Nancy’s second argument is that the circuit court’s maintenance award was inadequate in duration and amount. Nancy raises the following issues in support of this contention: (1) the court impermissibly double counted Nancy’s pension by awarding it to her in the property division, and then including the pension’s income stream in the maintenance analysis; (2) the court erroneously exercised its discretion by limiting maintenance to four years; (3) the court erred by imputing a full-time income to Nancy commencing one year after the divorce; and (4) Bryan’s income was understated in the maintenance analysis.

¶16 Because we conclude that Nancy is correct that the circuit court erroneously double counted her pension by both awarding it to her in the property division and including the pension’s income stream in the maintenance analysis, we remand for reconsideration of maintenance on this basis.

¶17 The rule against the impermissible double counting of assets was set forth in *Kronforst v. Kronforst*, 21 Wis. 2d 54, 123 N.W.2d 528 (1963). In that case, the circuit court included the husband’s interest in his employer’s profit-sharing trust as a divisible asset and, when dividing the couple’s assets, awarded the husband’s interest in the profit-sharing trust to him. *Id.* at 59, 63. The circuit court also ordered the husband to pay permanent maintenance to the wife from his income, which was limited to disability payments and payments from the profit-

sharing trust. *Id.* at 58, 63-64. Upon review, the supreme court held that the circuit court erred when it included the payments from the profit-sharing trust as part of the husband's income when calculating maintenance, and explained: "Such an asset cannot be included as a principal asset in making division of the estate and then also as an income item to be considered in awarding [maintenance]." *Id.* at 63-64.

¶18 We applied the *Kronforst* double counting rule in *Seidlitz*, where the wife was awarded the entire interest in the husband's pension as part of the equal property division upon divorce. *Seidlitz v. Seidlitz*, 217 Wis.2d 82, 84, 578 N.W.2d 638 (Ct. App. 1998). We rejected the husband's claim that, in deciding whether to grant his motion to terminate maintenance to the wife upon the husband's retirement, the circuit court should have considered the wife's interest from the pension that she was awarded in the property division. *Id.* at 90. We endorsed the circuit court's conclusion that it could not "count [the pension] for property division and then also count it as an income stream for maintenance," noting that "a spouse should not be forced to invade the property division in order to live while the other does not." *Id.* at 91-92; *see also McReath*, 335 Wis. 2d 643, ¶60 ("pension benefit payouts ... do not create value separate from the pension as an asset at the time of the property division").

¶19 Here, the record reflects that the circuit court impermissibly treated Nancy's pension as a divisible asset for purposes of property division and counted the income stream from that pension when determining maintenance.⁴

¶20 At the divorce hearing, Bryan testified that his net monthly income was \$4,681. Nancy testified that, at the time of the divorce, she was working approximately sixteen hours per week and earning \$9.50 per hour. In addition, evidence submitted at the divorce hearing showed that Nancy had accrued "a monthly pension benefit of \$720.26" that was "payable at age 60 and for life."

¶21 Nancy asked the circuit court to award her maintenance for an indefinite length of time in the amount of \$4,500 to \$5,000 per month. Bryan asked the court to order maintenance for four years in the amount of \$750 per month. As to the four-year duration, Bryan's trial counsel explained: "Ms. Baxter will be turning 56 years old in the spring of this coming year. That would carry maintenance for her until she is 60. She has ... a pension that she can draw from"

¶22 In discussing the maintenance award, the circuit court stated: "I would like to think about the four years. I do think ... tying [maintenance] to when Mrs. Baxter turns 60 has some merit. In other words you are getting your pension" Ultimately, the court awarded maintenance to Nancy for a period of

⁴ In response to Nancy's double counting argument, Bryan asserts that the circuit court was permitted to consider Nancy's pension "for the purposes of property division" and "for income purposes" under *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997). *Cook* dealt with whether military retired pay may be considered as property for purposes of property division and as income to the recipient for purposes of calculating child support. *Id.* at 169. In that case, our supreme court held "that the *Kronforst* 'double-counting' rule does not apply in the context of child support." *Id.* at 180. Accordingly, Bryan's reliance on *Cook* is misplaced.

four years. As stated above, the court ordered Bryan to pay Nancy maintenance in the amount of \$2,800 per month from December 2012 to December 2013, and in the amount of \$2,500 per month from December 2013 to December 2016, with maintenance payments terminating on December 9, 2016.

¶23 Because Nancy was awarded the value of the pension as part of the property division, any monthly benefits that she might receive from the pension could not be counted as part of her income stream in determining maintenance. *Seidlitz*, 217 Wis. 2d at 91-92. Yet, the circuit court indicated that it was tying its award of maintenance to Nancy's income from her pension, and therefore terminated maintenance after four years. At that time Nancy would be fifty-nine years old, and, as the court noted, when she turned sixty years old her income would be supplemented by payments from her pension. We agree with Nancy that the court counted Nancy's pension as part of her income stream after awarding Nancy the value of the pension as part of the property division. This was impermissible double counting. We therefore remand to the circuit court for reconsideration of the maintenance award.

Additional Arguments Regarding Maintenance Award

¶24 Nancy makes three additional arguments challenging the circuit court's maintenance award. Nancy's first additional argument is that the court did not apply the correct standard for determining the duration of maintenance. In response, Bryan contends that the court's maintenance award was fair and consistent with the statutory factors for maintenance. We conclude that the circuit court failed to adequately consider one of those statutory factors, Nancy's ability to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

¶25 The statutory factors set forth at WIS. STAT. § 767.56 “are the touchstone of analysis in determining or reviewing a maintenance award.”⁵

⁵ WISCONSIN STAT. § 767.56 provides:

Maintenance. Upon a judgment of ... divorce ... the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.61.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market ... and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (7) The tax consequences to each party.
- (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
- (9) The contribution by one party to the education, training or increased earning power of the other.
- (10) Such other factors as the court may in each individual case determine to be relevant.

LaRocque v. LaRocque, 139 Wis. 2d 23, 32, 406 N.W.2d 736 (1987). These statutory factors “are designed to further [the two primary] objectives ... of maintenance: to support the recipient spouse in accordance with the needs and earning capacities of the parties (the support objective) and to ensure a fair and equitable financial arrangement between the parties ... (the fairness objective).” *Id.* at 33.

¶26 Here, the circuit court stated that “[t]he purpose of maintenance is to equalize [the parties’] incomes for a period of time,” and as to the duration of maintenance, the court stated that it considered “how long [to] pay this amount to allow the parties to transition to being single.” The record reveals that the court failed to consider at least one of the statutory factors, namely, the feasibility that Nancy can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal. *See* WIS. STAT. § 767.56(6). On remand, the circuit court is to consider this factor, and also the dual objectives of maintenance set forth above.

¶27 Nancy’s second additional argument is that the circuit court erred by imputing full-time income to her commencing one year after the divorce because the evidence does not support, and the court did not find, that Nancy’s twenty-hour work week is either voluntary or unreasonable. Bryan responds that the court’s determination that Nancy should be working full-time was properly based on Nancy’s “extensive history in the retail industry” and Nancy’s failure to seek another position or increased hours.

¶28 By “imputing income” to Nancy, the circuit court considered Nancy’s earning capacity, rather than her actual earnings. “The [circuit] court may consider earning capacity when determining a ... maintenance obligation if it

finds a spouse's job choice voluntary and unreasonable.” *Sellers v. Sellers*, 201 Wis. 2d 578, 587, 549 N.W.2d 481 (Ct. App. 1996).

¶29 Here, the circuit court stated:

Mrs. Baxter has some current health issues such that I'll expect you to work half-time for the next 12 months [T]hen after one year, so you get yourself situated and placed, you should be working full-time.... [T]he reason I believe that to be true ... is ... you've always worked and you've actually said ... that you have a great resume in retail.... I think I also understand not just from age, but your infirmities, that you can't stand, and Mr. Bushaw [Bryan's trial counsel], you did say you probably could work full-time at a desk job.

The court based its determination that Nancy could work full-time within one year after the divorce on these factors. However, Nancy testified to the contrary:

Q: Given the right job, you say you're capable of working full-time?

A: With my health change, no.

Q: Then my question is how many hours are you capable of working?

A: I would like to be around 20 right now.

Q: Not what you would like. How many hours physically are you capable of ?

A: Twenty at the most.

Nancy also testified as follows:

Q: [D]o you think that you would be capable of working full-time if you had a desk job?

A: If I could get glasses, if I go to the eye doctor possibly. My lenses and my eyeglasses have been at the house for a year and a half.

Bryan’s trial counsel suggested that Nancy could work “in a management capacity in a retail setting.” We are unable to find, and the parties do not point to, testimony regarding Nancy’s ability to obtain full-time employment at a “desk job,” beyond the portions of the transcript set forth above. On remand, the court is to evaluate whether Nancy’s job choice is voluntary and unreasonable before considering Nancy’s earning capacity instead of her actual earnings.

¶30 Nancy’s third additional argument is that Bryan’s income was understated because Bryan’s rental income and his “tax advantages from his ownership of real property” were not considered in the maintenance analysis.⁶ To decide these issues, we would need to make findings of fact regarding the rental income and the tax advantages that Bryan receives, which we cannot do. *See Tourtillott v. Ormson Corp.*, 190 Wis. 2d 291, 294, 526 N.W.2d 515 (Ct. App. 1994) (court of appeals “is precluded from making findings of fact where the facts are in dispute”). These issues must therefore be addressed before the circuit court.

Debt on Marital Home

¶31 Nancy’s third main argument is that a “transcription error” appeared on a document that was incorporated into the divorce judgment, which resulted in the circuit court incorrectly determining that the debt on the marital home was

⁶ As to the rental income, Bryan contends that “Nancy did not object” to the exclusion of Bryan’s rental income from the maintenance analysis. We understand Bryan to argue that Nancy forfeited this argument. Nancy cites to various portions of the record where she stated that Bryan’s rental income should be included in the maintenance analysis. We therefore reject Bryan’s argument that Nancy forfeited this claim.

Additionally, Bryan does not respond to Nancy’s argument that Bryan’s tax advantages from his ownership of real property were not factored into the maintenance analysis. He thus concedes this point. *See Shadley v. Lloyds of London*, 2009 WI App 165, ¶26, 322 Wis. 2d 189, 776 N.W.2d 838 (“Arguments not rebutted on appeal are deemed conceded.”).

\$164,400, and incorrectly setting the equalization payment. Nancy asserts that Bryan's testimony and other documents submitted to the court indicated that, as of the date of the divorce, the debt on the marital home was \$154,500. Nancy contends that the "transcription error" affected Bryan's equalization payment to Nancy, and resulted in Bryan receiving \$9,900 more than the court "expected or intended." Nancy argues that Bryan should be ordered to pay her an additional \$4,950 to account for the "transcription error."

¶32 The record indicates that, as of the date of the divorce, the debt on the marital home was \$154,500. Bryan agrees that the debt on the marital home was \$154,500 as of the date of the divorce. He nevertheless contends that there was no "transcription error." Bryan appears to argue that the circuit court correctly determined that the debt on the marital home was \$164,400 because, as of the date of the *separation*, the debt on the marital home was \$165,242.77. We understand Bryan to argue that the court properly valued the debt on the marital home as of the date of the separation instead of the date of the divorce, because Bryan made mortgage payments during the pendency of the divorce action for which he should have received credit.

¶33 "Generally, assets are valued and divided on the date of divorce." *Finley v. Finley*, 2002 WI App 144, ¶48, 256 Wis. 2d 508, 648 N.W.2d 536. However, "[s]pecial circumstances can warrant a deviation from" this general rule. *Preiss v. Preiss*, 2000 WI App 185, ¶20, 238 Wis. 2d 368, 617 N.W.2d 514. A circuit court determines what constitutes special circumstances on a case-by-case basis. *Franke v. Franke*, 2004 WI 8, ¶64, 268 Wis. 2d 360, 674 N.W.2d 832.

¶34 Bryan does not develop an argument, based on the record and legal authority, that the circuit court intended to deviate from the general rule that assets

are to be valued as of the date of the divorce. Moreover, this court has previously rejected the argument that the debt on the marital home should be valued as of the date of the separation instead of the date of the divorce to give credit to the party who lived in the marital home and made mortgage payments during the pendency of the divorce action. See *Rumpff v. Rumpff*, 2004 WI App 197, ¶¶26, 28, 276 Wis.2d 606, 688 N.W.2d 699 (rejecting husband’s argument that special circumstances warranted a valuation of the mortgage as of the date of separation based on the fact that husband made mortgage payments during the pendency of the divorce action, because husband “had the benefit of living in the residence” and made mortgage payments in lieu of paying rent).

¶35 We agree with Nancy that the circuit court should have valued the debt on the marital home as of the date of the divorce when calculating the value of the assets awarded to Bryan and the equalization payment.

CONCLUSION

¶36 As set forth above, we agree with Nancy that (1) the rental property was a divisible asset and, therefore, should have been included when dividing the divisible assets, (2) the circuit court erroneously double counted Nancy’s pension, and (3) the debt on the marital home should have been valued as of the date of the divorce, not the date of the separation. In addition, as to maintenance, we also agree with Nancy that the court should have considered Nancy’s ability to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, evaluated whether Nancy’s job choice is voluntary and unreasonable before considering Nancy’s earning capacity instead of her actual earnings, and considered Bryan’s rental income and his tax advantages from his ownership of real property. Accordingly, we reverse and remand to the circuit

court for further proceedings, which will include reconsideration of the property division, the maintenance award, and the equalization payment, consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

